Attachment 1: Initial Comments of ITAA
CC Docket No. 96-45 et al.
Universal Service FNPRM
(April 22, 2002)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	
Federal-State Joint Board on Universal Service	CC Docket No. 96-45
1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated With Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	CC Docket No. 98-171
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	CC Docket No. 90-571
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	CC Docket No. 92-237 NSD File No. L-00-72
Number Resource Optimization	CC Docket No. 99-200
Telephone Number Portability	CC Docket No. 95-116
Truth-in-Billing and Billing Format	CC Docket No. 98-170

Comments of the Information Technology Association of America

Jonathan Jacob Nadler
Angela Simpson
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, N.W.
Box 407
Washington, D.C. 20044
(202) 626-6838

Counsel for the Information
Technology Association of America

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SUMMARY

ITAA supports adoption of a connection-based universal service fund ("USF") assessment methodology, which could provide a stable, sufficient, and equitable method for calculating telecommunications carriers' USF payment obligations, while creating incentives for broadband deployment.

A Connection-Based System Could Benefit ISPs

Adoption of a connection-based assessment system could eliminate three deficiencies in the current system that have an adverse impact on Information Service Providers ("ISPs").

Establishment of a sufficient funding base. The current USF assessment system bases carriers' USF payment obligations on their end-user telecommunications revenue. Concerns that the amount of end-user telecommunications revenue may decline over time have led to ill-conceived proposals to "broaden the base" by imposing USF payment obligations on ISPs. Adoption of a connection-based regime would base carriers' USF contributions on a large – and, indeed, growing – funding base, thereby eliminating the basis for these proposals.

Promotion of broadband migration. Under the current assessment system, a carrier incurs increased USF payment obligations when a customer migrates from a dial-up narrowband Internet access service, which generates intrastate revenues, to a DSL-based broadband Internet service, which generates interstate revenues. The carrier typically passes these increased costs on to its customers, effectively creating a "broadband penalty." By contrast, under the proposal contained in the *Further Notice,* both dial-up and DSL connection would be treated as residential "connections to a public network" and, therefore, would generate identical USF payment obligations for the carrier – thereby eliminating the basis for the "broadband penalty."

Reduced competitive distortion in the information services market. Under the current system, a carrier can undercount "end-user telecommunications revenues" from the provision of telecommunications services to its affiliated ISPs. This allows the carrier to make a smaller USF payment when it provides telecommunications service to its information service operations than it makes when it provides the same telecommunications service to a non-affiliated ISP – thereby enabling the carrier to provide information services to its subscribers at a lower price than can an equally efficient non-affiliated ISP. Adoption of a connection-based assessment system would eliminate carriers' ability to undercount telecommunications revenues from the provision of service to its ISP affiliate because the carrier's USF payment obligation would be based on how many network connections it provides, not on the amount of "end-user telecommunications revenue" that it recognizes.

The Commission Should Preserve the Balance Between the Burden Shouldered By Multi-Line Business Customers and Other Customers

While the adoption of a connection-based assessment regime could provide some significant benefits to ISPs, there is significant uncertainty regarding the impact that the new regime will have on the rates that ISPs pay for telecommunications services. Therefore, one year after the full implementation of the connection-based regime, the Commission should conduct an Initial Implementation Review. At that time, the Commission should make any necessary adjustment to ensure that the new regime has neither: (1) materially altered the "balance" between the portion of USF revenues generated from services provided to multi-line business and the portion of USF revenues generated from services provided to other customers nor (2) adversely affected any discernable class of customers.

The Commission should conduct a follow-up study each year thereafter. The Commission should adjust proportionately the USF charges assessed for connections provided to residential, single-line business, and mobile customers if the study demonstrates that portion of the total USF payments attributable to these customers has changed by more than ten percent from the proportion at the time of the Initial Implementation Review.

The Commission Should Continue to Treat All ISPs as *Users* of Telecommunications Services, Rather Than *Providers* of Telecommunications

While the Commission does not seek to impose a general USF payment obligation on ISPs, some language in the *Further Notice* suggests that so-called "facilities-based ISPs" might be required to make direct payments to the USF. Requiring these ISPs make direct payments to the USF is impermissible as a matter of law and unwise as a matter of policy. It also would be irreconcilable with the methodology proposed in the *Further Notice.* The possibility that an ISP might use facilities that it has deployed, rather than use facilities deployed by a carrier, does not alter the fact that the ISP is providing its subscribers with an information service – not an "independent connection to a public network."

The Commission Should Ensure That the Connection-Based Methodology Does Not Put Non-Carrier-Affiliated ISPs at an Unfair Competitive Disadvantage

The proposed connection-based assessment methodology could inadvertently put non-carrier ISPs that offer DSL-based Internet access services at a competitive disadvantage in relation to carrier-affiliated ISPs. A carrier that provides the DSL-based Internet access service to residential subscribers could take the position that, because the subscriber is a *residential* customer, the carrier's USF payment obligation is *one dollar* per month. By contrast, when the carrier provides DSL to a non-affiliated ISP, it could take the position that, because the ISP is a *business* customer, the carrier's USF payment obligation is equal to one "base factor." Using the example contained in the *Further Notice,* this would be a charge of *four dollars* per month. The carrier would then pass this cost on to the non-affiliated ISP. The non-affiliated ISP, in turn, would have little choice but to pass this cost on to its subscribers – thereby putting it at a significant competitive disadvantage in relation to the carrier-affiliated ISP.

There are a several possible solutions to this problem. The best solution, however, would be for the Commission to rule that a carrier that provides DSL service over a line that is also used to provide voice telecommunications service need not pay a separate connection-based USF charge. This approach would provide administrative simplicity, while providing a powerful incentive for broadband migration.

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Comments of the
Information Technology Association of America

The Information Technology Association of America ("ITAA") hereby files these comments in response to the Commission's Further Notice of Proposed Rulemaking ("*Further Notice*") in the above-captioned proceeding.[1]

[1] *Federal-State Joint Board on Universal Service, et al.,* Further Notice of Proposed Rulemaking and Report and Order, CC Docket No. 96-45, *et al.*, 17 FCC Rcd 3752 (2002) ("*Further Notice*").

INTRODUCTION

ITAA supports the adoption of a connection-based assessment system to determine telecommunications carriers' obligations to make payments to the Universal Service Fund ("USF"). The approach proposed in the *Further Notice* – if properly implemented – could provide a stable, sufficient, and equitable method for calculating carriers' USF payment obligations, while creating incentives for further broadband deployment. The Commission, however, must carefully monitor implementation of the new regime and make necessary adjustments to ensure that it does not alter the balance between the portion of USF contributions generated from the provision of telecommunications service to multi-line business customers (including Internet Service Providers ("ISPs")) and the portion of USF contributions generated from the provision of telecommunications service to other customers.

ITAA welcomes the Commission's assurance that, as under the present regime, ISPs generally will not be required to make direct payments to the USF. However, ITAA urges the Commission not to require so-called "facilities-based ISPs" to make direct USF payments; such a requirement would be unlawful as well as inconsistent with the proposed connection-based assessment methodology. The Commission also must ensure that the connection-based approach does not give carrier-affiliated ISPs an unfair competitive advantage over non-carrier-affiliated ISPs.

STATEMENT OF INTEREST

ITAA is the principal trade association of the computer software and services industry. ITAA has 500 member companies located throughout the United States – ranging from major multinational corporations to small, locally based enterprises. ITAA's members include a significant number of ISPs. Because ISPs are large users of telecommunications services, they make substantial contributions to universal service through the payments that they make to their telecommunications service providers. ITAA therefore has participated actively in the Commission's *Universal Service* docket. ITAA was also pleased to intervene in support of the Commission in the appeal of the Commission's initial *Universal Service Order*.[2] ITAA intends to comment further on the application of universal service obligations to ISPs in the Commission's separate *Wireline Broadband Internet Access* docket.[3]

I. THE COMMISSION SHOULD ADOPT A CONNECTION-BASED ASSESSMENT SYSTEM TO CALCULATE CARRIERS' UNIVERSAL SERVICE FUND PAYMENT OBLIGATIONS

The Commission has requested comment on a proposal to "fundamentally reform the [universal service] assessment system by assessing contributions based on the number and capacity of connections provided to a public network."[4] ITAA supports adoption of a connection-based approach, which could provide a stable, sufficient, and equitable method for calculating telecommunications carriers' USF payment obligations, while at the same time creating incentives for broadband deployment. Because of the significant uncertainty regarding the financial impact that the new regime will have on different categories of users, however, ITAA recommends that the Commission conduct an annual implementation review. If necessary, the Commission should take measures to preserve the balance between the portion of USF contributions generated from the provision of telecommunications services to multi-line

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[2] *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 440-44 (5th Cir. 1999).

[3] *Appropriate Framework for Broadband Access to Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, 17 FCC Rcd 3019 (2002) ("*Wireline Broadband Internet Access Notice*").

[4] *Further Notice* ¶ 31.

business customers (including ISPs) and the portion of USF contributions generated from the provision of telecommunications services to other customers.

A. A Connection-Based Assessment System – If Properly Implemented – Would Benefit ISPs and Their Subscribers

The current "end user telecommunications revenue" assessment system has a number of shortcomings, several of which have a particularly adverse impact on ISPs.

- Under the current assessment system, carriers' contribution obligations are based on "end-user interstate telecommunications revenues," which are expected to continue to decline, thereby resulting in an increasing "contribution factor." This encourages ill-conceived proposals to require ISPs to make direct payments to the USF.

- Under the current assessment system, a carrier incurs increased USF payment obligations when a customer migrates from a dial-up narrowband Internet access service, which primarily generates intrastate revenues, to DSL-based broadband Internet service, which generates interstate revenues. Because USF costs ultimately are passed on to customers, the current assessment system creates a disincentive for customers to migrate to broadband Internet access services.

- Under the current assessment system, carriers may undercount "end-user telecommunications revenues" from the provision of telecommunications services to carrier-affiliated ISPs and from the provision of bundled packages that combine telecommunications and "stand alone" information services. This improperly reduces the carrier's USF payment obligations and, ultimately, the price that the carrier must charge for Internet access and bundled services – thereby placing non-affiliated ISPs at an unfair competitive disadvantage.

As demonstrated below, adoption of a connection-based assessment system could eliminate all three of these deficiencies.

1. Creation of a stable and sufficient assessment base

Under the current assessment system, a telecommunications carrier's obligation to make payments to the USF is assessed by multiplying each carrier's billed interstate and international telecommunications revenue by a "contribution factor" specified by the Commission. Because interstate and international telecommunications revenues are expected to continue to decline, the "contribution factor" is likely to increase steadily over time. Carriers are likely to pass these increasing costs on to customers that purchase interstate and international telecommunications services. This, in turn, is likely to encourage ill-advised proposals to "broaden the funding base" by requiring ISPs to make direct payments to the USF.[5]

By contrast, because the number of network connections continues to rise, a connection-based assessment system will ensure a sufficient – and, indeed, growing – funding base. As a result, the per-connection assessment rate imposed on telecommunications carriers should remain reasonably constant over time. This, in turn, will make it possible to provide greater stability and predictability for telecommunications users – while removing the purported justification for imposing USF payment obligations on ISPs.[6]

2. Incentives for broadband migration

The current USF assessment system may deter some residential subscribers from switching from narrowband to broadband Internet access services. Traffic carried over the Internet is jurisdictionally mixed. While much of the traffic is jurisdictionally interstate, a significant portion is jurisdictionally intrastate.[7] Under current Commission policy, however, when a subscriber uses a dial-up connection to access his or her ISP's local point of presence,

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[5] As discussed further below, requiring ISPs to make direct payments to the USF would violate current law and would be inconsistent with express congressional policy. *See, infra,* Part II.A.

[6] *See, infra,* § I.B.2 (discussing the need for annual review and, if necessary, adjustment of the per-connection charges to preserve the existing balance between the universal service funding burden shouldered by multi-line business customers and other users).

[7] Access to the World Wide Web provides a useful example. An ISP subscriber that seeks to access a site on the Web must first connect to the local point of presence of its ISP, and must then indicate the information that he or she seeks to access by typing in the Website's uniform resource locator ("URL"). The ISP then routes the subscriber's request toward the appropriate Website. In many cases, the information will be located in a computer server situated in another state or even another country. In other cases, however, the information will be located in a server situated in the same state as the subscriber. This is especially common in the case of frequently requested information, which an ISP may "cache" in multiple servers, located in major population centers, in order to provide subscribers with faster and more efficient access.

most of the telecommunications revenue generated is considered jurisdictionally intrastate.[8] By contrast, if the subscriber uses a DSL connection to access the same ISP, the telecommunications revenue generated generally is considered interstate.

Because telecommunications carriers' USF payment obligations are based on their interstate and international revenues, a carrier incurs additional USF payment obligations in any case in which a subscriber replaces a voice-grade "second line" with a DSL connection – even though the jurisdictional mix of traffic carried by the provider may remain the same. Because the telecommunications carrier is likely to pass the costs of its USF payment obligation to its customers based on the amount of interstate revenues each customer generates, a customer that switches from a dial-up connection to a DSL-based connection is likely to incur additional USF-related costs.[9] This "broadband penalty" may deter some customers from switching from dial-up to broadband Internet access services.

Adoption of the proposed connection-based approach will provide incentives for residential users to obtain broadband services. Under the proposal contained in the *Further Notice,* a telecommunications carrier would incur no increase in USF payment obligations in any case in which a residential subscriber switches from a from dial-up second line to a DSL line. Both services would be treated as residential "connections to a public network" and, therefore, would generate identical USF payment obligations for the carrier.[10] As a result, subscribers that

[8] The one exception is revenue from the subscriber's payment of the subscriber line charge which, under current rules, is considered to be interstate end-user telecommunications revenue.

[9] In those cases in which an ISP acquires DSL telecommunications service from the carrier, and uses that to provide its customers with Internet access service, the carrier presumably passes its USF payment costs on to the ISP which, in turn, passes it on to its subscriber.

[10] *See Further Notice* ¶ 38 (proposing to assess a flat one dollar per month fee for each "connection to a public network" provided to residential customers, regardless of the speed) and ¶ 42 (seeking comment on whether to treat DSL connections as independent network connections). As discussed below, *see infra* § II.B, the Commission should consider imposing no connection charge in any case in which a carrier provides DSL over a "shared line." If

upgrade from a second line dial-up Internet connection to DSL-based Internet access likely would see the portion of their service costs attributable to universal service support *decrease*.[11]

The proposed connection-based assessment system also would create incentives for business users to obtain higher capacity telecommunications services. Under the proposal, a telecommunications carrier will be charged an assessment equal to: one "base factor" for every connection up to a 1.544 Mbps (T-1) line; five "base factors" for every connection equal to or greater than 1.544 and less than 45 Mbps (T-3); and forty "base factors" for every connection equal to or greater than 45 Mbps.[12] As a result, if a multi-line business user goes from a 56 Kbps dial-up connection to a T-1 connection – a twenty-four-fold increase in speed – the increase in its telecommunications carrier's USF charges will only be five-fold. The customer could subsequently increase its connection speed to nearly 45 Mbps without generating any further increase in its carrier's USF charges. Here again, in many cases, as subscribers upgrade to greater bandwidth, the portion of their service costs attributable to universal service support will decrease.[13]

Adoption of a connection-based system also would obviate the need for the Commission to make difficult and contentious determinations regarding the jurisdictional nature of various telecommunications services. A carrier's duty to make USF payments would be based on the

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the Commission adopts this proposal, then a carrier's USF payment obligation would *decrease* if the carrier convinced its customers to migrate from a dial-up second line to DSL. This, in turn, would lower the cost to subscribers of DSL-based Internet access. The end-result would be to create a powerful incentive for broadband migration.

[11] This will occur in any case in which: (a) the carrier passes on the USF payment obligation to its customers proportionately, and (b) the customer pays more for DSL-based Internet access than it did for a second line plus dial-up Internet access.

[12] *Further Notice* ¶ 52.

[13] This example again assumes that the provider will pass on its USF costs to its customers proportionately.

provision of a connection – not on the jurisdictional classification of the traffic carried over that connection.

3. Reduced competitive distortion in the information services market

The current USF assessment system has another defect: it can allow telecommunications carriers to obtain an unfair competitive advantage when they participate in the information services market. At the present time, a telecommunications carrier that provides telecommunications service to a non-affiliated ISP must make a payment to the USF based on the charges billed to the ISP for the telecommunications service. The telecommunications carrier typically passes these costs on to the ISP, which must recover them from its subscribers.

There is some uncertainty, however, as to the extent to which telecommunications carriers that provide information services (either directly or through a separate affiliate) make payments to the USF based on the "imputed revenue" from the provision of the telecommunications service to their information service operations. If a carrier makes a smaller USF payment when it provides telecommunications service to its information service operations than it makes when it provides the same telecommunications service to a non-affiliated ISP, the carrier can provide information services to its subscribers at a lower price than an equally efficient non-affiliated ISP – thereby distorting competition in the information services market.[14]

A carrier also can obtain an unfair competitive advantage in the information services market by bundling stand-alone telecommunications and information services into a single-price "package." While the Commission has adopted two "safe harbor" allocation methods applicable

[14] The danger that a carrier will "under-count" the telecommunications revenue derived from the provision of telecommunications service to its information service operations – and, thereby, improperly reduce its USF payment obligation – is particularly great in the increasing number of situations in which the carrier does not provide the underlying telecommunications service at generally available tariffed rates.

to bundled service packages, it has given carriers discretion to use alternative methods to determine what portion of the charges for a bundled service package should be considered "end-user telecommunications revenue" on which USF payments must be made.[15] A carrier that does not allocate an appropriate share of the revenue from a bundled package to the telecommunications component can reduce the amount that it must pay to the USF. This, in turn, allows the carrier to reduce the price that it charges the customer for the package. In effect, the carrier is providing discounted telecommunications services to those customers that purchase the bundled package. Such cross-subsidization and discrimination undermines the ability of non-carrier-affiliated ISP to offer a viable competitive offering.

Adoption of a connection-based approach would reduce the ability of carriers to distort competition in the information services market. Under this approach, a carrier would no longer need to determine the proper amount of telecommunications revenue to recognize when it provides telecommunications to its information service operations or when it includes telecommunications services in a bundled package offered to end-users. Rather, the carrier's USF payment obligation would be based on how many network connections it provides. This would significantly reduce the need for the Commission to monitor and enforce cost allocation requirements.[16]

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[15] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254 (g) of the Communications Act of 1934, as Amended; 1998 Biennial Regulatory Review of Consumer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access, And Local Exchange Markets,* Report & Order, 16 FCC Rcd 7418 at ¶¶ 47-54 (2001).

[16] If the Commission chooses not to adopt a connection-based assessment system, however, it should reiterate that a carrier must make the same the same USF payment when it provides a telecommunications service to its information service operations that it makes when it provides the same telecommunications service to a non-affiliated ISP. The Commission also should carefully monitor the amount of telecommunications revenue that carriers recognize when they provide bundled services.

B. The Commission Should Preserve the Balance Between the Burden Shouldered by Multi-Line Business Customers and Other Customers

While the adoption of a connection-based assessment regime could provide some significant benefits to ISPs, there is significant uncertainty regarding the impact that the new regime will have on the rates that ISPs pay for telecommunications services. Under the proposed connection-based assessment regime, telecommunications carriers will pay a one dollar per month USF charge for each network connection provided to residential, single-line business customers, and mobile customers. The balance of the revenue necessary to fund the universal program will be generated through variable assessments based on connections provided to multi-line business customers[17] – including ISPs, which are major purchasers of multi-line business, special access, and private line services. The Commission has asked for comments as to whether to adjust periodically the charge for connections provided to residential, single-line business customers, and mobile connections to accommodate the growth, over time, in both the number of connections and universal service funding levels.[18] ITAA supports adoption of a two-step annual review and adjustment procedure that will preserve the balance between the portion of USF contributions generated from the provision of telecommunications services to multi-line business customers and the portion of USF contributions generated from the provision of telecommunications services to other customers.

1. Initial implementation review

The Commission has indicated that the transition from the current assessment system to a connection-based assessment system is not expected to alter materially the balance between the USF funding burden that ultimately must be shouldered by residential customers and the USF

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[17] *Further Notice* ¶ 37.

[18] *Id.* ¶ 74.

funding burden that ultimately must be shouldered multi-line business customers.[19] In order to confirm that this expectation is correct, the Commission should conduct a review, one year after the full implementation of the connection-based regime ("Initial Implementation Review"). If the Commission determines, at that time, that the transition to a connection-based assessment regime has materially altered the "balance" between residential and business customers – or adversely affected a discernable class of customers – the Commission should adjust the contribution factors.

2. Annual review and adjustment

Without periodic adjustments, the portion of the USF payments derived from the provision of network connections to residential, single-line business, and mobile customers will almost certainly change over time. For example, as the Commission notes, the portion of the USF payments generated based on assessments for connections provided to residential, single-line business, and mobile customers could increase if the number of connections purchased by these users continues to grow.[20] On the other hand, if the size of the universal service program were to increase over time, charges assessed based on connections provided to multi-line businesses customers – which must cover any residual amounts necessary to fully fund universal service – could rise significantly. This, in turn, could lead telecommunications carriers to significantly increase prices charged to multi-line business customers.

The Commission should adopt an effective regime to preserve the balance between the USF funding burden that must be shouldered by residential, single-line business, and mobile customers and the USF funding burden that must be shouldered multi-line business customers.

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[19] *See id.* ¶ 38 ("[R]esidential customers would pay roughly the same overall recovery fees under a per-connection assessment system as they do under the existing methodology.").

[20] *Id.* ¶ 74.

Specifically, at the time of the Initial Implementation Review (or, if the Commission adjusts the contribution factors, one-year after the Initial Implementation Review), the Commission should determine (and make public) the exact percentage of USF payments attributable to connections provided to residential, single-line business, and mobile customers. This figure would become the Residential/Single-Line-Business/Mobile Initial Percentage ("RIP"). The Commission should conduct a follow-up study each year thereafter. The Commission should adjust proportionately the USF charges assessed for connections provided to residential, single-line business, and mobile customers if the study demonstrates that the portion of the total USF payments attributable to these customers has increased or decreased from the RIP by more than ten percent.

II. THE COMMISSION SHOULD ENSURE THAT THE ADOPTION OF A CONNECTION-BASED ASSESSMENT SYSTEM DOES NOT ADVERSELY AFFECT ISPs

The Commission should implement the connection-based assessment system in a manner that is consistent with its long-standing recognition that ISPs are users of telecommunications services – not providers of telecommunications. The Commission also should ensure that the new system does not inadvertently place non-carrier-affiliated ISPs at a competitive disadvantage.

A. The Commission Should Continue to Treat All ISPs as *Users* of Telecommunications Services, Rather Than *Providers* of Telecommunications

The *Further Notice* indicates that – just like under the current regime – ISPs, as a class, would not be required to make direct payments to the USF.[21] ITAA strongly endorses this

[21] *See Further Notice* ¶ 36 ("Under a connection-based assessment, *local exchange carriers, interexchange carriers, and CMRS providers* would contribute to universal service based on the number and capacity of end-user connections they provide to a public network." (emphasis added)); *id.* ¶ 42 ("[C]ertain information services, such as voice mail or dial-up Internet access, may not be deemed "independent" because they would not allow access to a

position. As ITAA has previously noted, as large users of telecommunication services, ISPs make significant contributions to universal service through the payments that they make to their telecommunications carriers. There is no justification for imposing a further contribution obligation.

While the Commission does not seek to impose a general USF payment obligation on ISPs, some language in the *Notice* suggests that so-called "facilities-based ISPs" might be required to make direct payments to the USF.[22] Requiring these ISPs make direct payments to the USF is impermissible as a matter of law and unwise as a matter of policy. Because ISPs to do not provide telecommunications to any party, the Commission cannot use its authority to require "*provider[s]* of interstate telecommunications . . . to contribute" to universal service[23] as a basis to require ISPs to make direct payments to the USF. Requiring ISPs to make direct payments to the USF also would be inconsistent with Congress' clearly articulated goal of preserving the Internet and other on-line services free from government regulation.[24] ITAA

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public network without an activated voice-grade connection."); *id.* ¶ 67 ("[I]f a customer purchases both a voice-grade connection and an information service . . . only the voice-grade connection would be subject to a per-connection assessment . . . regardless of whether [the information service] is provided by the carrier that also provides the voice-grade connection or . . . by an independent information service provider . . . because the information service does not provide access to a public network that is independent from the voice-grade connection.").

[22] *See Further Notice* ¶ 69 ("Under a connection-based assessment, there may be instances in which a provider of connections to a public network is not a provider of interstate telecommunications services, but instead is a provider of interstate telecommunications). The term "facilities-based ISP" refers to non-carrier ISPs (*i.e.,* ISPs that do not provide stand-alone telecommunications services), but which provide "last mile connectivity over their own facilities." *Wireline Broadband Internet Access Notice* ¶ 74.

[23] *See* 47 U.S.C. § 254(d) (emphasis added); *see also Wireline Broadband Internet Access Notice* ¶ 25 (An entity that provides broadband Internet access service over their own facilities "does not offer "telecommunications" to anyone, it merely uses telecommunications to provide end-users with wireline broadband Internet access services.").

[24] *See* 47 U.S.C. § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").

intends to address this issue in greater detail the comments it will file in *Wireline Broadband Internet Access* docket.

In any case, requiring ISPs to make direct payments to the USF cannot be reconciled with the methodology proposed in the *Further Notice.* Under the proposal, carriers would be required to make direct payments to the USF if they provide customers with an "independent connection to a public network." As the Commission itself recognizes, an entity that provides Internet access service does not provide an "independent connection to a public network" because the service that the ISP provides does "not allow access to a public network without an activated voice-grade connection."[25] The possibility that an ISP might use facilities that it has deployed, rather than use facilities deployed by a carrier, does not alter the fact that the ISP is providing its subscribers with an information service – not independent access to a public network. There is, therefore, no basis to impose connection-based charges on ISPs.

B. The Commission Should Ensure That the Connection-Based Methodology Does Not Put Non-Carrier-Affiliated ISPs at an Unfair Competitive Disadvantage

Even if the Commission continues to treat all ISPs as end-users, the proposed methodology could inadvertently put non-carrier ISPs that offer DSL-based Internet access services to residential subscribers at a competitive disadvantage in relation to carrier-affiliated ISPs. Typically, a subscriber seeking to purchase DSL-based Internet access service obtains a package that includes both Internet access and DSL. In those cases in which a carrier provides the DSL-based Internet access service, it could take the position that no USF payment is due because it is providing an information service, rather than an "independent connection to a public network." Alternatively, the carrier could take the position that it is providing two services to the

[25] *Further Notice* ¶ 42.

subscriber – a DSL connection and an information access service. Because the subscriber is a *residential* customer, the carrier would incur *one dollar* per month USF payment obligation.

By contrast, when the carrier provides DSL to a non-affiliated ISP, it could take the position that it is providing an independent connection for which a USF payment is due. Because the ISP is a *business* customer, the carrier would incur a USF charge equal to one "base factor."[26] Using the example contained in the *Further Notice,* this would be a charge of *four dollars* per month.[27] The carrier would then pass this cost on to the non-affiliated ISP. The non-affiliated ISP, in turn, would have little choice but to pass this cost on to its subscribers – thereby putting it at a competitive disadvantage in relation to the carrier-affiliated ISP.

The adverse impact of this strategy will become greater as residential DSL services become faster. Even today, some "flavors" of DSL have a speed of 1.544 Kbps or more. If a non-affiliated ISP were to purchase a DSL service operating at that speed, the carrier would incur a USF charge of five times the base rate.[28] Using the four dollar per month figure suggested in the *Further Notice,* this would yield a charge of *twenty dollars* per month. Here, again, the carrier presumably would pass this charge on to the ISP which, in turn, would have to pass this cost on to its subscriber. Few non-affiliated ISPs could compete if they were required to assume a burden so much heavier that that of their carrier-affiliated rivals.

There are several possible solutions to this problem. The Commission could require carriers to treat the provision of DSL service in conjunction with Internet access as the provision of a "public connection" to a business user. In that case, the carrier would incur the same USF

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[26] *Further Notice* ¶ 52.

[27] *See id.*

[28] *See id.*

charge that it incurs when it provides DSL to a non-affiliated ISP. This approach, however, would ultimately result in significantly higher costs for DSL-based Internet access services, thereby artificially inhibiting demand. Alternatively, the Commission could adopt a system in which ISPs can certify that they are obtaining DSL to provide Internet access service to residential subscribers. In such cases, the carrier (and, ultimately, the ISP) would incur only the one-dollar residential connection charge. The best solution, however, would be for the Commission to rule that a carrier that provides DSL service over a line that is also used to provide voice service need not pay a separate connection charge. This approach would avoid the administrative burden of certifying the purpose for which the ISP is using the DSL service, while promoting broadband deployment.

There are doubtless other means to resolve this issue. Any solution, however, must have two essential characteristics. First, ISPs should not be required to make direct payments to the USF. And, second, the USF payment obligation that the carrier providing the DSL incurs should be the same regardless of whether the carrier is providing the DSL in conjunction with an information service provided by an affiliated or non-affiliated ISP.

CONCLUSION

For the foregoing reasons, the Commission should adopt a connection-based system for determining carriers' USF payment obligations – subject to a procedure that preserves the balance between the portion of the USF revenues generated from assessments based on connections provided to multi-line business customers and connections provided to other customers. In implementing the new assessment system, the Commission should not require ISPs to make direct payments to the USF – regardless of whether an ISP deploys its own last mile facilities, rather than obtaining them from a carrier. The Commission also should ensure that carriers incur the same USF payment obligations when they provide DSL service to affiliated and non-affiliated ISPs.

Respectfully submitted,

INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

By: /s/ Jonathan Jacob Nadler

Jonathan Jacob Nadler
Angela Simpson
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, N.W.
Box 407
Washington, D.C. 20004
(202) 626-6838

Counsel for the Information Technology Association of America

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